# Mark Dean Schwab v. State of Florida

THE NEXT CASE ON THE COURT'S ORAL ARGUMENT CALENDAR, BEFORE I ANNOUNCE THAT CASE, WE WOULD LIKE TO WELCOME ANOTHER GROUP OF STUDENTS, FROM FLORIDA A&M UNIVERSITY, WE HAVE THE STUDENT GOVERNMENT SUPREME COURT, WHO WE ARE VERY GLAD IS ABLE TO BE HERE FOR THE OR A.M. ARGUMENTCAL EVEN -- FOR THE ORAL ARGUMENT CALENDAR, AS WELL AS FOR, TO SPEND SOME TIME WITH THE COURT IMMEDIATELY FOLLOWING ORAL ARGUMENT, SO THE CASE, NOW, ON THE CALENDAR, IS SCHWAB VERSUS STATE, SCHWAB VERSUS MOORE. MR. STRAIN OR MS. COOK.

THANK YOU. MAY IT PLEASE THE COURT. MY NAME IS DENISE LYLES COOK, FROM CCRC IN TAMPA, ON BEHALF OF MR. SCHWAB. STREETED -- SEATED WITH ME AT COUNSEL TABLE IS MR. BOB STRAIN, ON MR. SCHWAB'S BEHALF. WE ARE HERE ON THE STATE'S DENIAL OF A RULE 3.850 MOTION, AFTER AN EVIDENTIARY HEARING.

IT WAS AN EVIDENTIARY HEARING ON ALL ISSUES THAT YOU ARE NOW --

YES, THERE WAS. I WOULD LIKE, TO WITH THE COURT'S PERMISSION, FOCUS PRIMARILY ON THE JUDICIAL BIAS ISSUE IN THE STATE HABEAS PETITION, AND THE FAILURE OF TRIAL COUNSEL TO MOVE TO RECUSE THE TRIAL JUDGE IN THE APPEAL BRIEF.

LET ME ASK YOU THIS, NUMEROUS ISSUES THAT YOU HAVE HERE, JUDICIAL BIAS, IMPARTIAL JUDGE, WAIVER OF JURY,, FACTS OUTSIDE OF THE RECORD AND SO FORTH, APPEAR TO BE PROCEDURALLY BARRED. WHY SHOULD WE CONCERN OURSELVES WITH THOSE ISSUES AT ALL?

WELL, WITH RESPECT TO THE STATE HABEAS PETITION, IT IS OUR CONTENTION THAT THESE ISSUES ARE NOT PROCEDURALLY BARRED, BECAUSE TAIL YOUR OF -- FAILURE OF APPELLATE COUNSEL, TO RAISE THE JUDICIAL BIAS ON DIRECT APPEAL, WAS FUNDAMENTAL ERROR, FUNDAMENTAL ERROR BEING AN IMPROPRIETY AT TRIAL THAT RISES TO THE LEVEL OF A DUE PROCESS VIOLATION, BECAUSE JUDGE RICHARDSON FAILED TO RECUSE HIMSELF ON HIS OWN MOTION, MR. SCHWAB WAS DENIED HIS RIGHT TO DUE PROCESS OF LAW, THE VERY ESSENCE, THE RIGHT --

DON'T YOU HAVE TO ACTUALLY PROVE, FOR THAT, THAT THERE WAS ACTUAL JUDICIAL BIAS, AS OPPOSED TO WHETHER THERE WAS A GROUND THAT A LAWYER COULD HAVE BROUGHT, IN ORDER TO SHOW THAT THE APPELLATE COUNSEL SHOULD HAVE RAISED IT ON DIRECT APPEAL? I MEAN, BECAUSE IF HE HAD RAISED IT ON DIRECT APPEAL, THE SAME ARGUMENT WOULD HAVE BEEN MADE. THAT IS THAT IT WAS WAIVED, UNLESS YOU SHOW THAT THERE WAS ACTUAL BIAS, ON JUDGE RICHARDSON'S BEHALF.

I THINK THAT WE DID ADDRESS THAT IN THE STATE HABEAS PETITION, THAT THERE WAS ACTUAL BIAS. THE BIAS OF THE JUDGE ALL STEMMED FROM A PRETRIAL COMMENT AND ACTION THAT HE MADE, REGARDING WHETHER HE WANTED THIS PARTICULAR CASE. WHEN ASKED IF HE WANTED THE CASE, HE MADE HIS HAND INTO A GUN AND FIRED T THAT SHOWS HIS PRECOMMITMENT TO THE, NOT ONLY, GUILT, BUT A PRECOMMITMENT TO THE DEATH PENALTY, AND, FURTHER, THERE IS A THREAT OF BIAS THAT RUNS THROUGHOUT THE ENTIRE TRIAL. NUMBER ONE, THE STATE ATTORNEYS, TWO ASSISTANT STATE ATTORNEYS, WITNESSED THIS PARTICULAR ACTION ON THE PART OF THE TRIAL JUDGE, AND THEY FILED AFFIDAVIT WHICH WERE IN THE RECORD ON DIRECT

APPEAL. THERE WAS A HEARING, WHERE THE STATE ATTORNEYS OFFICE BROUGHT THESE AFFIDAVITS TO TRIAL COUNSEL'S ATTENTION AND, ALSO, TO THE TRIAL JUDGE'S ATTENTION, SO EVEN IN THE FACE OF THE AFFIDAVITS, THE TRIAL JUDGE REFUSED TO RECUSE HIMSELF ON HIS OWN MOTION.

IN WHAT CONTEXT DID THEY BRING --

IT WAS A HEARING PRIOR TO THE TRIAL, WHERE THE STATE WAS GOING TO DETERMINE WHETHER THEY WERE GOING TO, ALSO, WAIVE NONJURY TRIAL. AT THAT SAME HEARING, THEY, ALSO, FILED A DOCUMENT, KNOWN AS STATE'S QUESTIONS FOR IN CAMERA INQUIRY, AND THEY WANTED THIS PARTICULAR JUDGE TO QUESTION THE DEFENDANT AND TO QUESTION THE TRIAL COUNSEL, TO MAKE SURE THAT MR. SCHWAB KNEW OF THE AFFIDAVITS. THE JUDGE REFUSED TO QUESTION MR. SCHWAB ENCAMERA AND REFUSED TO QUESTION THE TRIAL COUNSELING CAMERA.

SO NOW EVERYBODY KNOWS WHAT WE, NOW, KNOW, AT THE TIME, AND THAT IS THAT JUDGE RICHARDSON HAD BEEN PART OF SOMETHING, I GERTION THAT HAD OCCURRED IN THE CLERK'S OFFICE -- I GUESS, THAT HAD OCCURRED IN THE CLERK'S OFFICE, WHERE HE MADE THESE GESTURES, AFTER THERE WAS A QUESTION ABOUT THE CASE, SO THEN THE TRIAL COUNSEL HAS THE OPPORTUNITY, AT THAT TIME, TO MOVE TO RECUSE. NOT ONLY DOESN'T HE DO IT, BUT ACTUALLY JUDGE RICHARDSON ASKS THE DEFENDANT DOES HE, KNOWING ALL THIS, DOES HE STILL WANT JUDGE RICHARDSON TO SIT ON THE CASE. CORRECT?

I DON'T KNOW IF IT EXACTLY OCCURRED LIKE THAT. THERE WAS A COLLOQUY REGARDING RECUSAL.

NOW, ASSUMING THERE IS NOT ACTUAL BIAS, THEN THE OTHER ISSUE WOULD BE THAT THE TRIAL COUNSEL WAS INEFFECTIVE, FOR NOT RAISING THIS. WOULD THAT BE --

THAT'S CORRECT.

AND THE JUDGE THAT HEARD THE EVIDENTIARY HEARING, DID JUDGE RICHARDSON TESTIFY AT THE EVIDENTIARY HEARING?

YES, HE DID.

WHAT DID JUDGE RICHARDSON SAY ABOUT IT?

HE WAS ASKED IF HE RECALLED THE AFFIDAVITS, AND HE SAID THAT HE RECALLED ROBIN LEMONITIAS'S AFFIDAVIT BUT NOT JOHN McCLEAN'S AFFIDAVIT. HE TESTIFIED AS TO THE CONTENT OF THE AFFIDAVITS.

WHAT DID HE SAY AS TO WHY HE MADE THOSE GESTURES?

HE DIDN'T SAY. HE SAID, BASICALLY, THAT HE RECALLED THE AFFIDAVIT, THAT HE RECALLED THIS PARTICULAR STATE ATTORNEY ALLEGING THAT HE HAD MADE SOME GESTURE WITH HIS HAND, BUT HE DIDN'T DENY I IT, BUT HE, ALSO, DIDN'T CONFIRM IT, AS WELL.

WAS HE ASKED ABOUT --

I DON'T BELIEVE HE WAS SPECIFICALLY ASKED THE QUESTION "DO YOU REMEMBER MAKING YOUR HAND INTO A GUN AND FIRING IT".

AND COUNSEL FOR THE DEFENSE AND FOR THE STATE WERE PRESENT DURING HIS EXAMATION?

YES, AT THE EVIDENTIARY HEARING, YES, YOUR HONOR.

AND HE COULD HAVE BEEN ASKED THAT?

YES, HE COULD HAVE.

AND WHAT WAS TRIAL COUNSEL'S REASON FOR SAYING WHY HE OR SHE DIDN'T MOVE TO RECUSE JUDGE RICHARDSON, AFTER RECEIVING THE AFFIDAVITS THAT RELATED THIS INCIDENT?

THEY -- AND, AGAIN, IT IS OUR CONTENTION THAT FAILURE TO RECUSE THIS JUDGE, WHO HAS PRECOMMITTED TO DEATH AND TO GUILT, WAS INEFFECTIVE, BUT TRIAL COUNSEL TESTIFIED, AT THE EVIDENTIARY HEARING, THAT THEY THOUGHT THAT JUDGE RICHARDSON WAS RELIGIOUS, THAT HE WAS NEW, THAT HE WOULD BE THE BEST CHANCE FOR MR. SCHWAB. HOWEVER, THAT WAS A FAULTY PREMISE, BECAUSE JUDGE RICHARDSON HAD NO SENTENCING HISTORY WHATSOEVER.

BUT THEY MADE A STRATEGIC DECISION, BASED ON THE BEST OF THEIR KNOWLEDGE AND ABILITY, AT THAT TIME, FACED WITH WHAT THEY CONSIDERED, I GUESS, A FAIRLY OVERWHELMING CASE OF GUILT.

I DON'T BELIEVE THAT IT WAS STRATEGY. I DON'T THINK THAT --

IS THAT WHAT THE JUDGE -- WHAT DID THE JUDGE FIND, IN THIS CASE, THAT NEED REVIEWING?

WITH RESPECT TO THE RECUSAL ASPECT, AT THE EVIDENTIARY HEARING, I DON'T THINK THAT JUDGE HOLCOMB ADDRESSED THAT, IN HIS ORDER, BUT, AGAIN, THAT DOESN'T RELIEF THE JUDGE FROM, ON HIS OWN MOTION, RECUSING HIMSELF ON HIS OWN MOTION. THAT --

WHAT WOULD BE THE BASIS OF THAT? THE JUDGE, ON HIS OWN MOTION, RECUSING HIMSELF.

CANON 3-C-1, WHICH WAS IN EFFECT AT THE TIME OF MR. SCHWAB'S TRIAL, SAID THAT A JUDGE SHOULD RECUSE FORM SELF, IF HIS IMPARTIALITY MIGHT REASONABLY BE QUESTIONED, AND IN THIS PARTICULAR CASE, WE HAVE GOT THE AFFIDAVITS. WE HAVE GOT THE STATE, WHO WANTS TO QUESTION TRIAL COUNSEL IN CAMERA, WANTS TO QUESTION MR. SCHWAB IN CAMERA.

HOW DO THOSE AFFIDAVITS COME ABOUT? THE STATE DIDN'T MOVE TO RECUSE HIM, DID THEY?

NO, THEY DIDN'T.

SO WHAT WAS THE MOVING FORCE FOR THESE AFFIDAVITS?

I THINK THEY WERE TRYING TO --

SOME AFFIDAVITS WERE JUST FILED IN THE CASE.

CORRECT. I THINK THAT THE --

THEY WERE FLESHING OUT WHETHER THIS WAS GOING TO BE A NONJURY OR A JURY TRIAL. WEREN'T THEY?

THEY WERE. THEY WERE FLESHING OUT WHETHER -- BUT THE AFFIDAVIT --

THERE IS A WHOLE, LONG COLLOQUY, THAT THE COURT HAD, WHICH THE COURT POINTED OUT THAT THIS IS NOT -- THIS MATTER BECOMES MORE POIGNANT, BECAUSE OF THE FACT THAT EVERYONE IS AGREEING THAT I SHOULD TRY THIS CASE NONJURY, SO I WANT TO FIND OUT IS THERE A PROBLEM HERE. I MEAN, THAT IS IN ESSENCE WHAT JUDGE RICHARDSON WAS DOING,

WASN'T IT?

HE TESTIFIED THAT TRIAL COUNSEL SPECIFICALLY WANTED HIM ON THE CASE, ALTHOUGH THERE WAS NO EVIDENCE THAT THEY SPECIFICALLY ASKED FOR HIM.

COULDN'T YOU PRETTY MUCH COME THOUGH THAT CONCLUSION, BY READING THE TRANSCRIPT?

YOU COULD. BUT THE -- WITH RESPECT TO THE COLLOQUYS, THERE WERE SEVERAL, BUT IT IS NOT SO MUCH THE QUANTITY OR THE QUEST, IT IS THE QUALITY OF -- OR THE QUESTIONS. IT IS THE QUALITY OF THOSE QUESTIONS, AND HAD THIS TRIAL JUDGE TAKEN MR. SCHWAB IN CAMERA AND ASKED HIM THOSE QUESTIONS FOR IN CAMERA INQUIRY, THEN WE MIGHT SAY THAT MR. SCHWAB AGREED TO NOT MOVE FOR RECUSAL OF THE TRIAL JUDGE. FURTHERMORE, MR. SCHWAB WAS OPERATING UNDER A MISREPRESENTATION BY TRIAL COUNSEL, THAT THIS PARTICULAR JUDGE HAD NEVER SENTENCED ANYONE TO DEATH, WHEN, IN FACT, JUDGE RICHARDSON NEVER HAD AN OPPORTUNITY TO DO SO. HE DIDN'T HAVE THE SENTENCING HISTORY.

BUT, SO, THAT STATEMENT REALLY IS TRUE. HE HAD NEVER SENTENCED ANYONE TO DEATH.

YES, BUT THEY LEFT OUT THE FACT, BUT HE HASN'T HAD AN OPPORTUNITY TO DO SO, SO THAT BECOMES A MISREPRESENTATION. THAT BECOMES AN INACCURACY THAT MR. SCHWAB IS OPERATING UNDER, WHEN HE IS ANSWERING THE QUESTIONS.

BUT IT IS STILL A STRATEGIC DECISION MADE BY THE LAWYER, THE FACT THAT HE HAD HIS FACTS WRONG, WOULD THAT BE A REASON FOR A REVERSAL?

WOULD THE FAILURE TO MOVE --

THAT -- THE FACTS WERE WRONG, RELATIVE TO WHETHER JUDGE RICHARDSON HAD TRIED OTHER CAPITAL CASES. THE LAWYER, STILL, BASED ON HIS MISINFORMATION, MADE A STRATEGIC DECISION, DID HE NOT, THAT HE WANTED JUDGE RICHARDSON TO BE ON THAT CASE.

I, AGAIN, WOULD NOT AGREE THAT THIS WAS STRATEGY, BECAUSE STRATEGY DOESN'T TAKE INTO AC COUNT -- ACCOUNT MISREPRESENTATIONS BY TRIAL COUNSEL TO THE CLIENT. STRATEGY ASSUMES THAT INVESTIGATION HAS BEEN DONE ON THE CASE. THEY WAIVED JURY TRIAL, THE DAY AFTER INDICTMENT.

IF -- LET'S ASSUME THAT WE AGREE THAT THERE IS DEFECTIVE PERFORMANCE, THE FIRST PRONG OF STRICKLAND, AND, ALSO, LET'S ASSUME THAT THERE IS NO FINDING IN THIS RECORD OF ACTUAL JUDICIAL BIAS IN THE TRIAL OF THIS CASE, THAT IT MAY HAVE BEEN A GROUND TO HAVE RECUSED JUDGE RICHARDSON, BUT THE TRIAL -- BUT THEY DIDN'T DO THAT. UNDER STRICKLAND, AS FAR AS THE SECOND PRONG OF PREJUDICE, A PROBABILITY OF A DIFFERENT OUTCOME OR UNDERMINE OUR CONFIDENCE IN THE RESULT OF THIS CASE, DON'T YOU HAVE A HURDLE TO GET THROUGH, AS FAR AS THE SECOND PRONG THAT IS INSURMOUNTABLE IN THIS CASE?

I DON'T THINK THAT WE DO. BASED ON FULMANONTE, A TRIAL BY A BIASED JUDGE IS STRUCTURAL ERROR.

I ASKED YOU, AGAIN, I THINK YOU HAVE TO, FIRST, BE ABLE TO SHOW THAT JUDGE RICHARDSON WAS ACTUALLY BIASED, AND JUDGE HOLCOMB FOUND THAT THERE WAS NO EVIDENCE TO SUPPORT THE FINDING THAT THE TRIAL JUDGE WAS BIASED, SO WE HAVE GOT -- I AM ASSUMING THAT HE IS NOT ACTUALLY BIASED BUT THERE MAY BE AN APPEARANCE, SO IF WE DON'T HAVE THAT, WE JUST HAVE THE FACT THAT MAYBE ANOTHER LAWYER MIGHT HAVE MOVED FOR RECUSAL OR MIGHT HAVE NOT WAIVED A JURY TRIAL. WHAT WOULD YOU HAVE TO SHOW, IF THERE IS NO CONSTITUTIONAL ERROR, AS FAR AS THE SECOND PRONG OF STRICKLAND?

AGAIN, I DO BELIEVE THAT THERE WAS A BIASED JUDGE, IN THIS PARTICULAR CASE.

THAT IS, REALLY, WHAT -- BECAUSE BIASED, JUDGE SHOULD HAVE BEEN BROUGHT UP ON APPEAL AND THAT IS YOUR YOUR BASIS FOR A HABEAS, AND THE FACTS THAT WE HAVE TO GO ON, IN THE ACTUAL BIAS, IS THAT IN THE AFFIDAVIT, AS TO WHAT WE HAVE TO GO ON, AS TO JUDGE RICHARDSON'S ACTUAL BIAS, AND THAT IS THIS ONE INCIDENT IN THE CLERK'S OFFICE.

RIGHT. BUT, AGAIN, WE HAVE SOME OTHER INCIDENTS THAT WE MENTIONED IN OUR PETITION IN OUR BRIEF, BUT WITH RESPECT TO PREJUDICE, ABSOLUTELY THERE IS PREJUDICE TO THE SYSTEM, TO THE APPEARANCE OF JUSTICE. FURTHER, MR. SCHWAB WOULDN'T HAVE WAIVED HIS RIGHT TO A JURY TRIAL, HAD HE KNOWN THAT THIS PARTICULAR JUDGE HAD NEVER HAD A CAPITAL CASE OR HAD NEVER HAD THE OPPORTUNITY TO SENTENCE SOMEONE TO DEATH. HE NEVER WOULD HAVE WAIVED THAT. HE, FURTHER, WOULD HAVE SOUGHT TO RECUSE JUDGE RICHARDSON. DURING ALL OF THOSE COLLOQUYS, DISCUSSIONS, HE IS LABORING UNDER THAT PARTICULAR MISREPRESENTATION THAT WAS MADE TO HIM BY TRIAL COUNSEL.

LET ME -- HELP ME WITH THIS MISREPRESENTATION BUSINESS, BECAUSE I THOUGHT IT WAS CLEARLY BROUGHT OUT THAT THIS WAS A NEWLY-APPOINTED JUDGE, AND THAT COUNSEL WAS, REALLY, BASING HIS RECOMMENDATION ABOUT NOT RECUSING THIS JUDGE, ON THE FACT THAT IT WAS A NEWLY-APPOINTED JUDGE. THAT ISN'T EVIDENCE IN THE RECORD?

THAT WAS PART OF THE EVIDENCE, BUT HE WAS, ALSO, ASKED, AT THE EVIDENTIARY HEARING, DID YOU TELL MR. SCHWAB THAT THIS TRIAL JUDGE HAD NEVER SENTENCED ANYONE TO DEATH, AND HE SAID THAT WOULD HAVE BEEN A PART OF OUR CONVERSATION. HE IS CONFRONTED WITH THAT FACT, THAT -- AT THE EVIDENTIARY HEARING, WHERE HE IS ASKED, WELL, ISN'T THAT, THEN, A MISREPRESENTATION, THAT, TELLING MR. SCHWAB JUDGE RICHARDSON HAS NEVER SENTENCED ANYONE TO DEATH BUT LEAVING OUT THE FACT "BUT HE HAS NEVER HAD THE OPPORTUNITY TO DO SO", ISN'T THAT A MISREPRESENTATION, AND TRIAL COUNSEL ANSWERS THAT BY SAYING I DON'T THINK I SPECIFICALLY SAID, MARK, HE HAS NEVER SENTENCED ANYONE TO DEATH, AND LEFT OUT "BUT HE HAS NEVER HAD A CHANCE". HE SAYS THAT, BUT, THEN, HE IS, ALSO, ASKED, WELL, IF MR. SCHWAB WERE TO TAKE THE STAND AND TESTIFY THAT YOU TOLD HIM THAT THIS PARTICULAR JUDGE HAD NEVER SENTENCED ANYONE TO DEATH, WOULD YOU REFUTE THAT, AND HE WOULD NOT REFUTE MR. SCHWAB'S TESTIMONY.

SO DID MR. SCHWAB TESTIFY?

YES. HE CERTAINLY DID.

AND HE TESTIFIED TO THAT EFFECT?

HE TESTIFIED THAT HE WAS TOLD THAT THIS PARTICULAR JUDGE HAD NEVER SENTENCED ANYONE TO DEATH, THAT BECAUSE OF THE PUBLICITY, THEY WOULDN'T BE ABLE TO GET A FAIR JURY, THAT WAIVING JURY WAS THE BEST WAY TO GO.

YOU ARE INTO YOUR REBUTTAL TIME.

THANK YOU.

MR. NUNNELLEY.

MAY IT PLEASE THE COURT. I AM KEN NUNNELLEY. I REPRESENT THE STATE OF FLORIDA IN THIS PROCEEDING. LET ME BACK UP AND START WITH THE TWO AFFIDAVITS, IF WE COULD. IT LOOKS SOMEWHAT PECULIAR, AND IT NEEDS SOME, I THINK, FLESHING OUT FOR THE COURT'S BENEFIT. TWO ASSISTANT STATE ATTORNEYS WERE PRESENT IN THE COURT CLERK'S OFFICE, ALONG WITH RANDY MOORE, WHO WAS AND IS AN ASSISTANT PUBLIC DEFENDER IN THE 18th JUDICIAL CIRCUIT

AND WHO, ALSO, WAS MR. SCHWAB'S ORIGINAL PUBLIC DEFENDER. THOSE THREE PEOPLE WERE PRESENT, WHEN THE GESTURE, IF YOU WILL, WAS MADE. MR. MOORE KNEW ABOUT THE GESTURE, BECAUSE HE WAS THERE. MR. MOORE TESTIFIED, AT THE EVIDENTIARY HEARING, AND HE WAS NEVER ASKED ABOUT THE GESTURE OR ANYTHING THAT TOUCH OR CONCERNED THE GESTURE ALLEGED TO HAVE BEEN MADE BY JUDGE RICHARDSON. THE STATE SUBMITTED THE TWO AFFIDAVITS PREPARED BY THE ASSISTANT STATE ATTORNEYS, ALONG WITH SOME SUGGESTED QUESTIONS THAT THE STATE WANTED PUT TO THE DEFENDANT AND HIS ATTORNEYS. THE DEFENDANT, THROUGH HIS ATTORNEYS, OBJECTED TO THAT PROCEDURE. AND NOW, THE DEFENDANT IS TRYING TO PUT THE STATE IN ERROR AND GAINED A REVERSAL, NOT ONLY BECAUSE OF A CONSIDERED TACTICAL AND STRATEGIC DECISION THAT HE MADE, BUT BECAUSE ONE OF HIS OBJECTIONS WAS SUSTAINED! AND THAT IS ABSOLUTELY AND URD -- ABSURD.

LET ME GET BACK TO ATTORNEY MOORE. THIS WAS HIS FIRST PUBLIC DEFENDER, CORRECT?

THAT'S CORRECT, MA'AM.

AND WAS HE THE ONE, OR AM I GETTING IT INCORRECT, THAT HE WAS THE ONE THAT ACTUALLY INITIATED THE DISCUSSION ABOUT PLEADING, AND, IN FACT, NOT PLEADING BUT HAVING A WAIVER OF JURY TRIAL, AND THAT THAT DECISION WAS MADE PRIOR TO THIS OTHER ATTORNEY GETTING ON THE CASE?

THAT IS CORRECT. RANDY MOORE, MR. MOORE WAS INVOLVED IN THE CASE FOR ABOUT A MONTH. HE WAS REPLACED BY BRIAN O 'NICK. I DON'T BELIEVE THE EXACT REASONS FOR MR. MOORE LEAVING THE CASE ARE INVOLVED OR SET OUT IN THE RECORD. IT HAD SOMETHING THAT HAD NOTHING TO DO WITH THE CASE OR ANYTHINGES. I DON'T KNOW, PERSONALLY, WHAT THEY WERE, BUT MR. MOORE DID NOT MAKE THIS DECISION TO RECOMMEND WAIVER OF A JURY, ON HIS OWN HOOK. THERE WAS CONSULTATION BETWEEN THE ELECTED PUBLIC DEFENDER, JAMES RUSSO, THE CHIEF ASSISTANT PUBLIC DEFENDER MARLENE ALVA, WHOM I AM SURE THIS COURT IS WELL FAMILIAR WITH, AND, MAYBE, EVEN A COUPLE OF OTHER PEOPLE.

WHAT DID THEY BASE THIS DECISION THAT THEY MADE ON?

THEIR DECISION WAS BASED UPON SEVERAL FACTORS. FIRST OF ALL, YOU HAD A DEFENDANT WHO HAD CONFESSED TO A CRIME THAT IS ABSOLUTELY HORRIBLE IN ITS FACTS. IT WAS BASED UPON OVERWHELMING EVIDENCE OF GUILT, AND IT WAS BASED UPON CONSULTATION WITH DR. MICHAEL RATTELIT, WHICH REVEALED TO DEFENSE COUNSEL THAT, BASED UPON DR. RATTELIT'S REVIEW OF FLORIDA DEATH CASES, IF THIS CASE GOT TO A JURY, THERE WAS GOING TO BE A DEATH RECOMMENDATION.

WHO IS THIS DOCTOR?

DR. MICHAEL RATTELI. IT IS A SOCIOLOGIST AT THE UNIVERSITY OF FLORIDA, AND HE HAS BEEN INVOLVED IN STATISTICAL ANALYSIS AND STUDY OF FLORIDA DEATH PENALTY CASES AND DEATH PENALTY CASES NATIONWIDE, FOR MANY, MANY YEARS. I CAN'T REMEMBER THE LAST TIME I CROSS-EXAMINED HIM. I CAN IT -- I THINK IT WAS IN EITHER THE SIMS CASE OR, PERHAPS, IN THE PROVINCE AND-CASE. BUT DR. -- OR IN THE PROVE -- PROVENZANO CASE. DR. RATTELIT HAS BEEN AROUND FOR SEVERAL YEARS. HE APPARENTLY DOES GOOD DEFENSE WORK, APPARENTLY. HE DOES WORK BASED UPON THE SPECIFIC FACTS AND THE AGGRAVATOR/MITIGATOR MIX, IF YOU WILL, BUT ALL OF THIS, AND MY POINT TO ALL OF THIS, JUSTICE QUINCE, IS THIS WAS NOT JUST A SNAP DECISION OF LET'S WAIVE A JURY AND SEE WHAT HAPPENS. THAT WASN'T WHAT THEY DID. THEY KNEW WHO THEIR TRIAL JUDGE WAS. THEY KNEW THEY HAD JUDGE RICHARDSON. THEY KNEW HE WAS A RATHER NEW JUDGE. THEY KNEW HE WAS A PRETTY RELIGIOUS MAN, AND THEY KNEW HE WASN'T GOING TO BE SWAYED OR INFLUENCED BY POLITICAL OVERTONES, AND THE EMOTIONAL NATURE OF THIS CASE, AND THIS IS, I BELIEVE, THE WAY BRIAN ONECK PUT IT, WHEN HE TESTIFIED AT THE EVIDENTIARY HEARING, CALLED FOR

TAKING THE JURY OUT OF THE MIX AND NOT GOING INTO SENTENCING WITH A JURY RECOMMENDATION OF DEATH AND THE EFFECT THAT SUCH A RECOMMENDATION WOULD HAVE ON THE TRIAL JUDGE. THEY WANTED TO HAVE THE CHANCE TO ARGUE STRAIGHT DOWN THE FACTS, STRAIGHT DOWN THE EVIDENCE, COLD, HARD MITIGATION, AND TAKE THE EMOTION OUT OF IT. THEY HAD A REASON FOR DOING IT. IT IS A LEGITIMATE TRIAL STRATEGY. MR. ONECK TESTIFIED, I BELIEVE, ALSO, AT THE EVIDENTIARY HEARING, THAT THE ONLY THING HE WOULD HAVE DONE DIFFERENTLY WAS, PERHAPS, THEY SHOULD HAVE PLEAD GUILTY AND GONE STRAIGHT INTO THE PENALTY PHASE. MR. SCHWAB DID NOT WANT TO DO THAT, BECAUSE HE THOUGHT A GUILTY PLEA WOULD RESULT IN WAIVING SOME POTENTIAL ISSUES ON APPEAL. HE WANTED TO PRESERVE THE POSSIBILITY OF GETTING SOME ISSUE OR ISSUES OUT OF THE GUILT PHASE.

WAS THERE, ALSO, TESTIMONY BY THE LAWYER OR LAWYERS, THAT THEY CONSIDERED THE FACT THAT, IF JUDGE RICHARDSON WAS OFF THE CASE, THERE WOULD BE ANOTHER JUDGE ON THE CASE, AND THAT THEY PREFERRED JUDGE RICHARDSON TO THE POTENTIAL ALTERNATIVES OF THE OTHER JUDGES THAT MIGHT HAVE TRACK RECORDS.

THAT IS CORRECT, JUSTICE ANSTEAD. THEY WERE QUITE EMPHATIC THAT JUDGE RICHARDSON WAS THE JUDGE THEY WANTED TO TRY THIS CASE, BECAUSE THEY WERE ABSOLUTELY CONVINCED THAT, IF JUDGE RICHARDSON DISQUALIFIED -- WAS DISQUALIFIED, THEY WOULD BE TRADING DOWN, AS FAR AS THEY WERE CONCERNED, IN TERMS OF THE JUDGE THAT WOULD TRY THE CASE.

DID ANY OF THE LAWYERS TESTIFY THAT THEY BELIEVED THAT JUDGE RICHARDSON WAS ACTUALLY BIASED?

NO, SIR. THE TESTIMONY WAS ALWAYS TO THE CONTRARY. NOBODY, NO ONE TESTIFIED, AND THERE IS NO SHRED OF EVIDENCE IN THIS HEARING, TO SUGGEST THAT.

WHEN THERE IS A SHOWING OF JUDICIAL BIAS, NEED THERE BE THE ADDITIONAL SHOWING OF PREJUDICE AT THAT POINT, OR IF THERE IS ABSOLUTE SHOWING OF JUDICIAL BIAS, DO YOU NEED THE SECOND PRONG?

WELL, I THINK IF YOU HAVE -- I THINK YOU ARE ASKING ME IF YOU HAVE ACTUAL BIAS, DO YOU HAVE TO SHOW THE SECOND PRONG OR THE PREJUDICE COMPONENT OF IT. I AM NOT SURE ABOUT THAT, BUT LET ME ANSWER IT THIS WAY, AND I AM NOT TRYING TO AVOID YOUR QUESTION. THIS CASE IS NOT DISSIMILAR FROM ASAY, HOWEVER THE DEFENDANT'S NAME IS PRONOUNCED, WHERE, I BELIEVE IT WAS DURING THE CHARGE CONFERENCE, THE TRIAL JUDGE MADE THE COMMENT THAT THIS CASE IS NOT GOING TO THE FIRST DCA, IF THERE IS A CONVICTION OF FIRST-DEGREE MURDER. AND THAT WAS BROUGHT BEFORE THIS COURT, AND THIS COURT FOUND NO ERROR IN THE REFUSAL OR DENIAL OF THE MOTION TO DISQUALIFY. AND I WOULD SUGGEST THAT, IF THAT STATEMENT IS INSUFFICIENT TO JUSTIFY DISQUALIFICATION, THEN A GESTURE BY THE TRIAL COURT, WHICH -- BY THE TRIAL JUDGE, WHICH WAS, BY THE WAY, WELL BEFORE OR PRIOR TO THE ASSIGNMENT OF THIS CASE TO HIM, CANNOT AMOUNT TO ACTUAL BIAS.

WHEN YOU SAY "WELL BEFORE", WEREN'T THEY ACTUALLY DISCUSSING THIS CASE, WHEN THIS TOOK PLACE?

ACCORDING TO THE AFFIDAVIT, THE WAY IT CAME UP, THEY WERE -- APPARENTLY MR. SCHWAB HAD JUST BEEN TAKEN INTO CUSTODY, I BELIEVE, AND HE WAS TAKEN INTO CUSTODY IN OHIO, AND THERE WAS AN ARTICLE IN -- NO. I AM SORRY. I MISSPOKE. HE HAD BEEN IDENTIFIED AS A SUSPECT BUT HAD NOT YET BEEN ARRESTED. THE ARTICLE IN THE PAPER THAT THE ASSISTANT STATE ATTORNEYS OR ATTORNEY OR ATTORNEYS WERE READING, REFERRED TO THAT, AND

ACCORDING TO THE AFFIDAVIT, ONE OF THE PROSECUTORS, WHO, BY THE WAY, WERE NOT THE TRIAL PROSECUTOR IN THIS CASE, HELD UP THE NEWSPAPER AND SAID SOMETHING TO THE EFFECT OF, JUDGE, HOW WOULD YOU LIKE TO GET A CASE LIKE THIS? AND JUDGE RICHARDSON RESPONDED SOMETHING TO THE EFFECT OF, NO, AND THEN SAID, SURE, YEAH, RIGHT, SOMETHING ALONG THOSE LINES, AND MADE, SUPPOSEDLY, THE GESTURE OF MAKING HIS HAND INTO A GUN. NOW, IT CERTAINLY BEGS THE QUESTION AS TO WHETHER -- AS TO WHO THE GUN WAS AIMED AT. IT MAY WELL HAVE BEEN AIMED AT THE STATE ATTORNEY, FOR MAKING SUCH A COMMENT, BUT THE BOTTOM LINE IS NO EVIDENCE WAS BROUGHT OUT ABOUT THIS, AT THE EVIDENTIARY HEARING. JUDGE RICHARDSON TESTIFIED, AND HE WASN'T ASKED ABOUT THIS. THESE TWO STATE ATTORNEYS ARE STILL AROUND. THEY ARE NOT WITH THE STATE ATTORNEYS OFFICE, BUT NOTHING PRECLUDED MR. SCHWAB FROM BRINGING THEM IN, HAD HE WANTED TO DO SO. AND THE BOTTOM LINE IS THERE IS NO ACTUAL BIAS, THERE IS NO APPEARANCE OF BIAS, THERE IS NO ERROR!

WE DON'T HAVE TO DECIDE THE ISSUE, IF A PROPER MOTION TO RECUSE HAD BEEN FILED IN A TIMELY FASHION, WHETHER THAT WHICH YOU JUST ALLEGE WOULD BE ENOUGH TO AT LEAST --

NO, MA'AM. THAT IS NOT BEFORE THE COURT.

SO WE ARE, REALLY, ONLY LOOKING AT WHETHER, IN THIS SITUATION, THERE WAS ACTUAL BIAS.

I AM NOT SURE THAT THEY HAVE ACTUALLY PLED ACTUAL BIAS ALL THAT WELL, BUT I SUPPOSE THAT IS PROBABLY THE BEST -- THAT IS THE ONLY WAY, I BELIEVE, THIS COURT COULD REACH IT, AND THAT IS -- AND THERE IS A FAILURE OF PROOF, AS TO A CLAIM OF ACTUAL BIAS. THIS IS ONE OF THOSE KIND OF UNUSUAL CIRCUMSTANCES, WHERE WE HAVE A CLAIM THAT CROSSES OVER, BETWEEN THE 3.850 MOTION AND THE HABEAS PETITION, AND IT WAS ACTUALLY A CLAIM THAT WAS FLESHED OUT OR, IN THIS CASE, COULD HAVE BEEN FLESHED OUT, THROUGH QUESTIONING AT THE 3.850 EVIDENTIARY HEARING. NOW, I WOULD SUGGEST THAT THE PROPER THING OR WHAT THEY HAD THE OPPORTUNITY TO DO, HAD THEY ELECTED TO DO SO, AS FAR AS I AM AWARE, THERE WAS NO IMPEDIMENT TO DEFENSE COUNSEL ASKING JUDGE RICHARDSON ABOUT THE AFFIDAVIT. AND ASKING AND GOING FURTHER AND INQUIRING JUST WHAT DID YOU MEAN BY THIS. THEY DIDN'T DO THAT, AND TO COME BEFORE THIS COURT AND ASK FOR A REVERSAL OF THE 3.850 OR FOR SOME OTHER RELIEF, WHEN THEY HAD THE CHANCE TO MAKE THEIR CASE AND FAILED TO MAKE IT, IS INAPPROPRIATE. IT IS A FAILURE OF PROOF IN THIS CASE. THERE IS NO PROOF OF ACTUAL BIAS. I QUOTED JUDGE RICHARDSON'S -- I AM DEVIATING OFF FROM THE ACTUAL BIAS OR FROM THE JUDICIAL BIAS ISSUE, TO SOME DEGREE, BUT IN THE STATE'S BRIEF, AND I DON'T RECALL THE PRECISE PAGE, I SET OUT JUDGE RICHARDSON'S RESPONSE, WHEN MR. SCHWAB'S COUNSEL ASKED HIM WHEN, IN THE COURSE OF THESE PROCEEDINGS, DID YOU DECIDE TO SENTENCE THIS MAN TO DEATH? AND I WOULD COMMEND THAT RESPONSE TO THIS COURT. IT IS RATHER LENGTHY, AND IT LEAVES ABSOLUTELY NO DOUBT THAT MR. SCHWAB RECEIVED A FAIR TRIAL. WITH RESPECT TO THE JURY WAIVER, AND LET ME CONCLUDE BY TOUCHING ON JUST A FEW THINGS, THAT CAME UP IN MY OPPONENT'S OPENING ARGUMENT. JUDGE HOLCOMB DID, IN FACT, FIND THAT IT WAS STRATEGY TO WAIVE THE JURY, IT APPEARS, IN THE RECORD AT PAGES 1249 THROUGH 50. THE JULY 3, 1991 HEARING, WHICH WAS WHEN THE AFFIDAVITS AND THE IN CAMERA QUESTIONS AND ALL OF THAT TOOK PLACE, IS AND ENDED AS EXHIBIT B TO THE STATE'S HAS BEEN YAS RESPONSE, FOR THE CONVENIENCE OF THE COURT -- HABEAS RESPONSE, FOR CONVENIENCE OF THE COURT, AND FINALLY THE DEFENDANT WAS NOT MISLED ABOUT JUDGE RICHARDSON. THE TRIAL COURT WAS FACED WITH CONFLICTING TESTIMONY BETWEEN MR. SCHWAB'S TESTIMONY, WITH RESPECT TO WHAT HE WAS TOLD BY HIS TRIAL ATTORNEYS, AND HIS TRIAL ATTORNEYS' TESTIMONY. THAT PRESENTED A CREDIBILITY CHOICE FOR JUDGE HOLCOMB, AND HE RESOLVED THAT CREDIBILITY CHOICE AGAINST THE DEFENDANT. IT IS SUPPORTED BY CLEAR AND CONVINCING EVIDENCE, AND THIS COURT SHOULD NOT DISTURB, IT UNDER STATE VERSUS SPAZIANO.

WHAT IS THE STATE'S POSITION, RELATIVE TO WHETHER OR NOT THIS ISSUE OF JUDICIAL BIAS IS BARRED AT THIS POINT?

THE STATE'S POSITION IS IT IS ABSOLUTELY BARRED. IT COULD HAVE BEEN RAISED. MR. SCHWAB AND HIS ATTORNEYS WERE VERY MUCH AWARE OF THESE AFFIDAVITS, AND THESE AFFIDAVITS ARE THE ONLY THING THAT HAVE EVER BEEN PROFFERED OR BROUGHT UP OR MENTIONED TO SUPPORT A CLAIM OF MAKING -- TO SUPPORT A CLAIM FOR A MOTION FOR RECUSAL, AND LIKE JUSTICE PARIENTE POINTED OUT, WE ARE NOT HERE TO DECIDE WHETHER OR NOT THOSE AFFIDAVIT WOULD HAVE BEEN SUFFICIENT, HAD A MOTION BEEN FILED. THAT IS NOT ON THE TABLE. BUT WHAT WE HAVE IS A CIRCUMSTANCE WHERE THE TRIAL COURT BENT OVER BACKWARDS TO MAKE SURE THAT MR. SCHWAB UNDERSTOOD WHAT WAS IN THOSE AFFIDAVIT, THAT HE KNEW ABOUT THE AFFIDAVIT, THAT HE HAD READ THE AFFIDAVITS, AND THAT HE STILL WANTED TO GO WITH A NONJURY TRIAL, AND IN FACT HE DID, AND I WOULD POINT OUT TO THE COURT THAT, ON THE MORNING THIS TRIAL STARTED, JUDGE RICHARDSON, BEFORE OPENING STATEMENTS, TELLS MR. SCHWAB, JUST IN CASE YOU HAVE CHANGED YOUR MIND ABOUT WAIVING THE JURY, WE HAVE GOT A VENIRE SETTING DOWN THE HALL. IF YOU WANT A JURY, WE ARE GOING TO GET YOU A JURY. IF WE CAN'T GET YOU A JURY IN BREVARD COUNTY, WE ARE GOING TO GO SOMEWHERE WHERE WE CAN. IT IS UP TO YOU. IF YOU WANT A JURY TRIAL, YOU CAN SAY SO. RIGHT NOW YOU WILL GET ONE. THAT IS ABSOLUTELY CLEAR IN THE RECORD. NO MOTION TO DISQUALIFY JUDGE RICHARDSON WAS EVER MADE. TRIAL COUNSEL DID NOT WANT TO DISQUALIFY JUDGE RICHARDSON. THEY, BASED UPON THEIR EXPERIENCE IN PRACTICING CRIMINAL DEFENSE LAW IN BREVARD COUNTY, FLORIDA, WANTED JUDGE RICHARDSON TO TRY THIS CASE, NOT THE JUDGE THAT -- THE JUDGE OR JUDGES WHO WOULD HAVE GOTTEN THE CASE, IF JUDGE RICHARDSON GOT OFF IT. IN CONCLUSION, I WOULD ASK THE COURT TO AFFIRM THE DENIAL OF THE 3.850 MOTION, DENY ALL RELIEF REQUESTED IN THE PETITION FOR HABEAS CORPUS. THANK YOU.

MS. COOK.

IF I MAY RESPOND TO A COUPLE OF MR. NUNNELLEY'S POINTS. THE CANON REQUIRING RECUSAL ON A JUDGE'S OWN MOTION, AND THE RULES FOR MOVING FOR RECUSAL ARE, ALMOST, TWOFOLD. YOU HAVE GOT THE ATTORNEY WHO WAS SUPPOSED TO BE PROTECTING THE CLIENT FROM A BIASED JUDGE, AND THEN ON THE OTHER HAND, YOU HAVE A JUDGE WHO SHOULD BE TRYING TO PROTECT NOT JUST CLIENT'S RIGHT TO A FAIR AND IMPARTIAL TRIAL BUT THE JUSTICE SYSTEM AND THE APPEARANCE OF JUSTICE. IN MR. SCHWAB'S CASE, HE WAS, IN I GUESS, THE PROVERBIAL ROCK AND A HARD PLACE. HE HAD, ON ONE HAND, A JUDGE WHO WOULDN'T RECUSE HIMSELF, EVEN IN THE FACE OF THE AFFIDAVITS. AND THEN WE HAVE TRIAL COUNSEL, WHO WON'T MOVE TO RECUSE THIS PARTICULAR JUDGE. I KNOW THERE HAS BEEN A LOT OF TALK ABOUT STRATEGY, WITH RESPECT TO THE TRIAL COUNSEL, BUT THIS ISN'T A REASONABLE ALTERNATIVE. YOU HAVE A JUDGE WHO HAS INDICATED THAT HE IS PRECOMMITTED TO A DEATH SENTENCE.

HOW DO WE KNOW THAT? THAT IS TWO THINGS THERE. DID EITHER OF THE AFFIDAVIT OF THE ASSISTANT STATE ATTORNEYS SAY THAT THEY TOOK THIS EXCHANGE TO MEAN THAT THE JUDGE WAS PREJUDGEING THE CASE AND WAS COMMITTED TO THE DEATH PENALTY?

NO. THEY DIDN'T PUT THAT WITHIN THEIR --

WAS THE JUDGE QUESTIONED ABOUT HIS DECISION-MAKING PROCESS, WITH REFERENCE TO IMPOSITION OF THE DEATH PENALTY?

I THINK HE WAS QUESTIONED ABOUT THAT, BUT --

DID HE GIVE ANY INDICATION THAT HE HAD MADE UP HIS MIND IN ADVANCE?

I DON'T BELIEVE SO. BUT --

WHERE IS THE -- YOU SAY THAT --

I THINK THAT BIAS CAN WORK ITS EVIL, EVEN WHEN THE PERSON WHO IS ACTUALLY BIASED DOESN'T BELIEVE THAT THEY ARE. WITH RESPECT TO THE TRIAL COUNSEL FAILING TO MOVE TO RECUSE JUDGE RICHARDSON, TRIAL COUNSEL TESTIFIED, WHICH IS AT THE EVIDENTIARY HEARING, WHICH IS EXTREMELY DISTURBING, THAT EVEN IF IT COULD BE PROVEN THAT THIS JUDGE WAS BIASED, EVEN IN THE FACE OF THE AFFIDAVIT, THEY WANTED THIS PARTICULAR JUDGE, YET THIS JUDGE HAD NO SENTENCING HISTORY WHATSOEVER. TRIAL COUNSEL, ALSO, TESTIFIED, AT THE EVIDENTIARY HEARING, THAT THE AFFIDAVITS THAT WERE FILED WERE SUFFICIENT FOR RECUSAL, BUT, AGAIN, THEY ARE BASING THEIR DECISION ON A JUDGE --

THE JUDGES WHO WERE GOING TO BE NEXT ON THE LIST, OBVIOUSLY THE LAWYERS THOUGHT THEY DID HAVE SOME SENTENCING HISTORY THAT WASN'T FAVORABLE TO THEM, ISN'T THAT THE PROPER CONNOTATION FROM THE RECORD?

THEY SAID THAT THIS PARTICULAR JUDGE HAD NEVER HAD THE OPPORTUNITY TO SENTENCE ANYONE TO DEATH, SO --

BUT THEY WERE CONCERNED ABOUT IF JUDGE RICHARDSON RECUSED, WHO WAS GOING TO BE NEXT.

BUT THEY, ALSO, HAD THE AFFIDAVITS THAT SHOWED THAT THIS PARTICULAR JUDGE HAD PREJUDGED THE CASE AND, ALSO, WAS COMMITTED TO A SENTENCE OF DEATH. I --

BUT YOU NEVER ANSWERED JUSTICE ANSTEAD'S QUESTION OF WHERE DO YOU GET THAT? HOW DO YOU MAKE THAT STATEMENT? WHAT EVIDENCE DO YOU HAVE THAT SUPPORTS THAT STATEMENT THAT HE WAS PREDETERMINED TO IMPOSE A SENTENCE OF DEATH?

WE HAVE THE AFFIDAVITS OF THE ASSISTANT STATE ATTORNEYS, WHO WERE READING WHAT THEY CHARACTERIZED AS THE GRIZZLY DETAILS OF THE CRIME -- AS THE GRISLY DETAILS OF THE CRIME, PRIOR TO THE JUDGE BEING ASSIGNED --

THEY, ALSO, NEVER, IN THERE, SAID THAT.

THEY SAID THEY ASKED JUDGE RICHARDSON IF HE WOULD LIKE A CASE LIKE. THAT HEY, JUDGE, WOULD YOU LIKE A CASE LIKE THIS? AND HE WALKS WAY AND SAYS NO AND COMES BACK AND SAYS, YEAH, I WOULD LIKE A CASE LIKE THIS, MAKES HIS HAND INTO A GUN AND FIRES IT. I DON'T KNOW WHAT ELSE THAT IS SUPPOSED TO MEAN, OTHER THAN THAT HE WAS GOING TO TAKE CARE OF THIS PARTICULAR DEFENDANT, THAT HE THOUGHT THAT THIS DEFENDANT DESERVED THE DEATH PENALTY PRIOR TO HEARING THE CASE. SO, AGAIN, YOU HAVE GOT THE JUDGE WHO SHOULD HAVE RECUSEED HIMSELF -- RECUSED HIMSELF ON HIS OWN MOTION.

SO YOU ARE SAYING THAT IS THE ONLY REASONABLE INFERENCE THAT CAN COME FROM THAT.

I THINK SO, AND THAT IS WHY THE STATE ATTORNEYS FILED THE AFFIDAVIT, BECAUSE THEY KNEW, WHEN JUDGE RICHARDSON WAS ASSIGNED TO THIS CASE, THEY NEEDED TO TAKE APPROPRIATE ACTION.

THANK YOU, MS. COOK. YOUR TIME IS UP. THANK YOU, COUNSEL, FOR YOUR ASSISTANCE IN THIS CASE.